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Kristin J. Graham
University at Buffalo School of Law (Student)

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KRISTIN J. GRAHAM*

"Congress shall make no law respecting an establishment of religion . . . ."[1]

INTRODUCTION

When this First Amendment prohibition, more commonly referred to today as the Establishment Clause, was added to the

* J.D. Candidate, University at Buffalo School of Law, May 1994.

1. U.S. CONST. amend. I. The portion of the First Amendment pertaining to religion reads in its entirety: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." *Id.* The first clause of this prohibition is more commonly referred to as the Establishment Clause, while the second clause is known as the Free Exercise Clause.

Both First Amendment religion clauses have been the focus of extensive discussion, and the tension between the Establishment Clause and the Free Exercise Clause has been the subject of much debate. This Comment, however, strictly confines itself to a discussion of the Supreme Court's jurisprudence with respect to the Establishment Clause. For a general discussion of the Free Exercise Clause, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). For a discussion of the tenuous relationship which exists between the Free Exercise Clause and the Establishment Clause, see Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980).

United States Constitution in 1791, "no other country had provided so carefully to prevent the combination of the power of religion with the power of the national government."[2]

James Madison and Thomas Jefferson led the movement to include this prohibition within the Bill of Rights.[3] By examining their arguments advocating the adoption of the Establishment Clause, an indication as to what was originally meant by these ten words can be ascertained.[4]

Over the last two hundred years, "[t]he responsibility of interpreting the First Amendment and applying it to complicated real situations has belonged ultimately to the United States Supreme Court."[5] The Court has not, however, always exercised this responsibility in a consistent manner. In fact, over time the Court has created, rejected, and then re-created various frameworks to be used in deciding Establishment Clause questions.[6]

This Comment traces the Supreme Court's jurisprudence with respect to the Establishment Clause. It focuses primarily on cases arising within the school context, as most disputes which have come before the Court raising Establishment Clause questions have involved the relationship between education and religion.[7] Part I presents the historical origins of the Court's early Establishment Clause jurisprudence. It was during these formative years that the Court developed the coercion analysis to decide Establishment Clause questions. Influenced by the writings of Madison and Jeffer-

2. ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION at xiii (1982). The drafters of the Constitution and the Bill of Rights knew of the religious persecution prevalent throughout Europe from which so many early-American settlers had fled. The drafters also recognized a continuation of that same intolerance and persecution here in America. They were determined, therefore, to prevent a combination of the power of religion with the power of the national government. LYNDA B. FENWICK, SHOULD THE CHILDREN PRAY?: A HISTORICAL, JUDICIAL, AND POLITICAL EXAMINATION OF PUBLIC SCHOOL PRAYER 1 (1989).

3. For a discussion of the important roles that both Madison and Jefferson played in framing the Establishment Clause, see FENWICK, *supra* note 2, at 91-100.

4. *See* MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978) (arguing that the Framers' intent regarding the Establishment Clause can be discerned from their writings and should be applied in constitutional adjudication today). *But cf.* Paul Brest, *The Misconceived Quest for the Original Understanding*, *in* INTERPRETING THE CONSTITUTION 227 (Jack N. Rakove ed., 1990) (positing that the Framers' intent should not be considered authoritative or binding in resolving current constitutional disputes).

5. FENWICK, *supra* note 2, at 1.

6. For an overview of the various approaches utilized by the Supreme Court in rendering decisions in this area, see DONALD L. DRAKEMAN, CHURCH-STATE CONSTITUTIONAL ISSUES: MAKING SENSE OF THE ESTABLISHMENT CLAUSE 1-50 (1991).

7. Writing for the majority in Edwards v. Aguillard, 482 U.S. 578 (1987), Justice Brennan commented: "The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Id.* at 583-84.

son,[8] this analysis required a specific finding of government coercion for a state or federal practice to be considered a violation of the Establishment Clause. Government must have coerced or compelled an individual to religious practice or belief for a constitutional violation to have occurred.[9]

Part II analyzes the Court's rejection of the coercion analysis in the early 1960s. This rejection eventually resulted in the development of the *Lemon* test,[10] which has been the principal tool employed by the Supreme Court over the last twenty years to decide Establishment Clause questions.

Part III discusses the difficulty that courts have experienced in applying the *Lemon* framework to complicated Establishment Clause cases and the resultant dissatisfaction that has emerged. Although present at all levels of the judiciary, this discontent has been most recognizable at the level of the Supreme Court.

Part IV traces a recent shift in the Court's jurisprudence with respect to the Establishment Clause. Resulting from the dissatisfaction with *Lemon*, this shift has led to the advocation of a return to a jurisprudence based upon a finding of government coercion.

Part V examines the Supreme Court's decision in *Lee v. Weisman*[11] and addresses the implications of *Lee* on future Establishment Clause cases. *Lee* provided the Court with the opportunity to respond to the expressed dissatisfaction with the *Lemon* test by rejecting the *Lemon* framework and adopting a coercion analysis. The Supreme Court failed to seize this opportunity. *Lee* neither explicitly overruled the *Lemon* test nor openly readopted the coercion analysis. However, Justice Kennedy's majority opinion in *Lee* heralds the Court's movement toward a readoption of the coercion analysis. This Comment asserts that the Court's Establishment Clause jurisprudence will ultimately come full circle with the readoption of the coercion analysis as the touchstone of an Establishment Clause violation.

The ramifications implicit in the readoption of the coercion

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8. *See* discussion *infra* part I.A.

9. *See* Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 VAL. U. L. REV. 37, 39 (1991); *see also* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

10. Named after the case which articulated its framework, Lemon v. Kurtzman, 403 U.S. 602 (1971), this test has been central to Establishment Clause jurisprudence since its inception. *See* discussion *infra* part II.C. Under the three-pronged *Lemon* test, a state or federal practice will pass constitutional muster only if: (1) the practice has a secular legislative purpose; (2) the practice's principal or primary effect is one that neither enhances nor inhibits religion; and (3) the practice does not foster an excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13.

11. 112 S. Ct. 2649 (1992). *Lee* addressed the constitutionality of invocations and benedictions at public high school graduation ceremonies. *See* discussion *infra* part V.

analysis are extremely significant. In effect, the Supreme Court's readoption of this analysis will provide for greater accommodation of religion in American society. Formal recognition of coercion as the central component of any Establishment Clause analysis will empower the Court to sustain many religious and social programs that it has been forced to strike down in the past under the flawed *Lemon* framework.[12] With the readoption of the coercion analysis as the central Establishment Clause framework, the Court would only be required to proscribe government conduct "that has the purpose and effect of coercing or altering religious belief or action."[13] Ultimately, this means that the government may not "undertake to aid religion, but that it can pursue its legitimate purposes even if to do so incidentally assists the various religions."[14] Such a practice would realign the Court's Establishment Clause jurisprudence not only with the intent of the Framers of the Constitution, but also with that of many Americans today.[15]

I. ORIGINS OF THE COERCION ANALYSIS

A. *Historical Origins*

Throughout its history, the Supreme Court has often relied upon the intent of the Framers in interpreting the Constitution and its amendments.[16] With respect to the religion provisions of the First

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12. As one commentator noted: "Under this standard, the Court would sustain many worthwhile, progressive social programs that it has struck down in the past—programs such as remedial education for economically and educationally deprived children on the premises of their own schools." McConnell, *supra* note 9, at 940 (citing Aguilar v. Felton, 473 U.S. 402 (1985)).

13. *Id.*

14. *Id.*

15. Public reaction to the decision in *Lee v. Weisman* was not favorable. For example, the Family Research Council expressed disgust at the Supreme Court's decision in *Lee*, calling its Establishment Clause jurisprudence "intellectually bankrupt." *Family Group Deplores Decision in School Prayer Case*, PR Newswire, June 24, 1992, *available in* LEXIS, Nexis Library, Wires File [hereinafter *Family Group*]. According to Family Research Council President Gary Bauer:

> *Lee v. Weisman* offered perfect opportunities to hold that religion is not toxic, that public schools are not the same thing as the state, and that people old enough to vote and be drafted are old enough to resist such minimal "indoctrination" as a theistic graduation invocation. But the Court threw away all three opportunities with both hands.
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> . . . .
>
> The Court's First Amendment jurisprudence continues to collide with reason, with its own stated rationale, with the living experience of the American people and with the guiding values of governance that have made prayer a fixture of our public life from Congress to the state legislatures to the Court itself.

Id.

16. *See* Davis v. Bandemer, 478 U.S. 109 (1986); Wallace v. Jaffree, 472 U.S. 38

Amendment, one "must look to the writings of James Madison and Thomas Jefferson . . . to guide (if not control) . . . interpretation of the establishment clause."[17]

James Madison represented Virginia as a member of the United States House of Representatives in the first Congress and played a critical role in the debates concerning the Establishment Clause.[18] Madison proposed an amendment to the Constitution that ultimately served as a basis for the religion clauses of the First Amendment.[19] His comments at the time indicated that the purpose

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(1985); Lynch v. Donnelly, 465 U.S. 668 (1984); South Carolina v. Regan, 465 U.S. 367 (1984); INS v. Chadha, 462 U.S. 919 (1983); Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); United States v. Richardson, 418 U.S. 166 (1974); Colgrove v. Battin, 413 U.S. 149 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972); Furman v. Georgia, 408 U.S. 238 (1972); Oregon v. Mitchell, 400 U.S. 112 (1970); Williams v. Florida, 399 U.S. 78 (1970); Powell v. McCormack, 395 U.S. 486 (1969); Bell v. Maryland, 378 U.S. 226 (1964); School Dist. of Abington v. Schempp, 374 U.S. 203 (1963); Adamson v. California, 332 U.S. 46 (1947); Cramer v. United States, 325 U.S. 1 (1945); Carter v. Carter Coal Co., 298 U.S. 238 (1936); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); Patton v. United States, 281 U.S. 276 (1930); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895); Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); Thurlow v. Massachusetts, 46 U.S. (5 How.) 504 (1847); Waring v. Clarke, 46 U.S. (5 How.) 441 (1847); Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838); Briscoe v. Kentucky, 36 U.S. (11 Pet.) 257 (1837); Osborn v. Bank of the United States, 22 U.S. (19 Wheat.) 738 (1824); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

17. DRAKEMAN, *supra* note 6, at 52. Of all the Framers who were significant in formulating the principles of liberty by which this nation was to be guided, Madison and Jefferson have been remembered as the "architects of our principles of religious liberty . . . ." American Jewish Congress v. City of Chicago, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting). The thoughts of these two individuals regarding the Establishment Clause can be gleaned from JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENT (1785), *reprinted in* THE COMPLETE MADISON, HIS BASIC WRITINGS 299 (Saul K. Padover ed., 1953) and THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1779), *reprinted in* 2 THE PAPERS OF THOMAS JEFFERSON 545 (Julian P. Boyd ed., 1950) [hereinafter JEFFERSON].

18. *See generally* JAMES MADISON ON RELIGIOUS LIBERTY (Robert S. Alley ed., 1985).

19. The text of Madison's original proposition read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1834). In the House, Madison's proposal underwent revision and the amendment became: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.* at 757. In the Senate, the amendment was revised further to read: "Congress shall make no law establishing Articles of faith or a mode of worship or prohibiting the free exercise of religion." 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: MARCH 4, 1789-MARCH 3, 1791, at 166 (Linda Grant De Pauw ed., 1972). As a result of the two distinct versions which existed in the House and the Senate, a joint conference committee was established "in which Madison played a large part in bringing

of the proposed amendment was to protect citizens against any form of governmental action aimed at coercing religious observance or support. As Madison explained, he "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[20]

An examination of Madison's insights regarding the Establishment Clause compels the conclusion that the First Amendment was not intended to create a complete separation between religion and civic life.[21] Rather, the Establishment Clause was intended to separate religion from the state primarily to protect individuals from the use of governmental power to coerce support for religion.

Thomas Jefferson was also a primary architect of the principles embodied in the First Amendment.[22] In 1779, Jefferson drafted the *Bill for Establishing Religious Freedom*,[23] which was aimed specifically at combating governmental coercion in the State of Virginia.[24] Jefferson, like Madison, did not advocate a complete separation of

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forth the language that was adopted as the religion clauses of the first amendment." Phillip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 9 (1978-79) (citing 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: MARCH 4, 1789-MARCH 3, 1791, at 181) (Linda Grant De Pauw ed., 1972)).

20. ANNALS OF CONG., *supra* note 19, at 758. Although the precise language of the First Amendment religion provisions ultimately adopted by Congress differed from Madison's original language, it appears as if "none of the changes affects Madison's point" about the true import and meaning of the Establishment Clause. *American Jewish Congress*, 827 F.2d at 136 (Easterbrook, J., dissenting).

21. CORD, *supra* note 2, at 50. Cord points out:

> [T]here is no support in the Congressional records that either the First Congress, which framed the First Amendment, or its principal author and sponsor, James Madison, intended that Amendment to create a state of complete independence between religion and government. In fact the evidence in the public documents goes the other way.

Id.

22. *See supra* note 17 and accompanying text.

23. JEFFERSON, *supra* note 17, at 545. Jefferson's bill was presented to the Virginia Assembly in 1779 and enacted into law in 1786. *See* FENWICK, *supra* note 2, at 196-97. For a comprehensive discussion of this bill, see THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY (Merrill D. Peterson & Robert C. Vaughan eds., 1988).

24. The bill read in pertinent part:

> [N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

JEFFERSON, *supra* note 17, at 546.

church and state,[25] but was concerned with the coercive propensities of governing bodies.[26]

The writings of both Madison and Jefferson illustrate that a separation of church and state was not only desirable but a requisite element of the new government. However, this separation was not to be a complete severance of one from the other. Both Madison and Jefferson were concerned primarily with the coercive influence that government could exert over its citizens with respect to religion.[27]

Ascertaining the Framers' intent is a difficult task. "Had the Founding Fathers possessed the foresight to predict the multitudes of interpretations we have tried to read back into their minds, they might have given us carefully crafted dissertations covering everything from the nascent public school movement to public Christmas

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25. Thomas Jefferson's views on church-state relations as embodied in the *Bill for Establishing Religious Freedom* have been viewed historically as advocating the erection of "an unbreachable wall of separation between church and state [making] religious opinions forever private and sacrosanct from intrusion." NATHAN SCHACHNER, THOMAS JEFFERSON: A BIOGRAPHY 160 (1951). However, such interpretations of Thomas Jefferson and the *Bill for Establishing Religious Freedom* "have mistaken Jefferson's overall model for church-state relations by taking his celebrated bill out of its proper legislative context." Daniel L. Dreisbach, *A New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in its Legislative Context*, 35 AM. J. LEGAL HIST. 172, 178 (1991). Jefferson's bill "did not expressly advocate a sweeping separation between religion and the state." *Id.* at 184. As one Harvard legal historian has argued, the *Bill for Establishing Religious Freedom* did not "in its enacting clauses explicitly prohibit establishment." *Id.* (quoting MARK D. HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 44 (1965)). Instead, Jefferson's bill was "more narrowly drawn to terminate compelled religious attendance or observance and remove penalties for dissenters who publicly expressed their religious opinions." *Id.* at 184-85.

Contrary to the view of the Establishment Clause and church-state relations that is most often attributed to Jefferson, his "bill did not advocate, in the modern sense at least, a strict separation between religion and civil government, nor was it a blueprint for a wholly secular state." *Id.* at 187. It was, instead, "a bold and eloquent affirmation of the individual's right to worship God, or not, according to the dictates of conscience, free from governmental interference or discrimination." *Id.*

26. Jefferson's bill specifically guarded against three forms of governmental coercion: taxation for the support of religion, religious tests for holding public office, and governmental restraints on the propagation of religious beliefs. *See* JEFFERSON, *supra* note 17, at 545.

27. The Supreme Court has observed:

> [Madison and Jefferson] knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to.

Engel v. Vitale, 370 U.S. 421, 435 (1962).

displays."[28] The Framers, apparently, lacked this foresight.[29] They did, however, provide some indication of the manner in which the Establishment Clause of the First Amendment was to be interpreted. The Supreme Court looked to the writings of Madison and Jefferson as it began to develop its early Establishment Clause jurisprudence.

B. *Early Establishment Clause Jurisprudence*

The Court's Establishment Clause jurisprudence is generally considered to have begun in 1947[30] when the Supreme Court comprehensively defined the meaning of separation between church and state in the landmark case of *Everson v. Board of Education*.[31]

Everson involved a challenge to a New Jersey statute authorizing the reimbursement of transportation fares to parents of children attending both public and parochial schools.[32] Everson, a district taxpayer, argued that the statute reimbursing parents of children attending sectarian schools was, in effect, a "law respecting an establishment of religion."[33]

The Court found that the statute did not violate the Establish-

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28. DRAKEMAN, *supra* note 6, at 72.

29. Arguably, the Framers did, in fact, possess the foresight to leave the Establishment Clause flexible enough to be interpreted as society changed even 200 years after the adoption of the Constitution. This argument fails, however, when one considers the religious persecution suffered by the founders of this nation which served as the impetus for the creation of a constitutional amendment addressing religious freedom. It is unlikely that individuals who had been oppressed because of their religious beliefs would construct a vague prohibition against these very same practices. *See supra* note 2 and accompanying text.

30. *See* CORD, *supra* note 2, at xiii. As one commentator stated: "[I]t was not until 1947 that the Supreme Court gave the establishment clause more than a passing reference." DRAKEMAN, *supra* note 6, at 6.

31. 330 U.S. 1 (1947). A handful of earlier Establishment Clause cases were heard by the Court. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); Reuben Quick Bear v. Leupp, 210 U.S. 50 (1908); Bradfield v. Roberts, 175 U.S. 291 (1899); Church of Jesus Christ Latter-Day Saints v. United States, 136 U.S. 1 (1890); Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1879). However, *Everson* is considered the seminal case in this constitutional area. *See* GLENN M. ABERNATHY, CIVIL RIGHTS UNDER THE CONSTITUTION 173 (6th ed. 1992) (stating that *Everson* was the "first case to reach the United States Supreme Court in which the Court really came to grips with the question of applying the First Amendment's establishment clause").

32. *Everson*, 330 U.S. at 3. Specifically at issue in *Everson* were the reimbursements made to parents of children who attended St. Mary's Cathedral High School, a Catholic School in New Jersey. DALE E. TWOMLEY, PAROCHIAID AND THE COURTS 20 (1979). For a critique of the *Everson* decision, see Rodney K. Smith, *Getting Off On the Wrong Foot and Back On Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the* Reynolds *and* Everson *Decisions*, 20 WAKE FOREST L. REV. 569 (1984).

33. *Everson*, 330 U.S. at 8.

ment Clause of the First Amendment.[34] In reaching this conclusion, the Court considered both Madison's and Jefferson's writings on the subject,[35] and ultimately held that a state or federal government practice could neither "force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. [Further], [n]o person [could] be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance."[36]

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34. The majority stated that the statute merely "provided a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.* at 18. According to Justice Black, state-paid policemen serving as crossing guards near parochial schools would also fall into this same constitutionally permissible category. *Id.* at 17.

35. DRAKEMAN, *supra* note 6, at 6-7. In *Everson*, "the nine justices unanimously interpreted the establishment clause broadly in the context of the Jeffersonian and Madisonian approach . . . ." *Id.* at 8.

36. *Everson*, 330 U.S. at 15-16. The complete test proposed in *Everson* to determine whether a governmental practice violates the Establishment Clause provided:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

Id.

Everson's "meaning" of the Establishment Clause, which clearly utilizes a coercive component in its analysis, has been repeatedly cited by courts in subsequent decisions. *See* Lee v. Weisman, 112 S. Ct. 2649 (1992); Allegheny v. ACLU, 492 U.S. 573 (1989); Edwards v. Aguillard, 482 U.S. 578 (1987); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Wallace v. Jaffree, 472 U.S. 38 (1985); Larkin v. Grendel's Den, 459 U.S. 116 (1982); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); Board of Educ. v. Allen, 392 U.S. 236 (1968); Abington v. Schempp, 374 U.S. 203 (1963); Torcaso v. Watkins, 367 U.S. 488 (1961); McGowan v. Maryland, 366 U.S. 420 (1961); Zorach v. Clauson, 343 U.S. 306 (1952); McCollum v. Board of Educ., 333 U.S. 203 (1948); Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990); Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985); Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983); Lubbock Civil Liberties Union v. Lubbock, 669 F.2d 1038 (5th Cir. 1982); Rhode Island Fed'n of Teachers v. Norberg, 630 F.2d 850 (1st Cir. 1980); St. Elizabeth Community Hosp. v. NLRB, 626 F.2d 123 (9th Cir. 1980); Lewis v. Califano, 616 F.2d 73 (3d Cir. 1980); Hatch v. Goerke, 502 F.2d 1189 (10th Cir. 1974); O'Malley v. Brierley, 477 F.2d 785 (3d Cir. 1973); Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972); *In re* Weitzman, 426 F.2d 439 (8th Cir. 1970); Northside Bible Church v. Goodson, 387 F.2d 534 (5th Cir. 1967); United States v. Seeger, 326 F.2d 846 (2d Cir. 1964); Quappe v. Endry, 772 F. Supp. 1004 (S.D. Ohio 1991); Weisman v. Lee, 728 F. Supp. 68 (D.R.I. 1990); Doe v. Human, 725 F. Supp. 1499 (W.D. Ark. 1989); Hewitt v. Joyner, 705 F. Supp. 1443 (C.D. Cal. 1989);

Central to the Court's analysis in *Everson* was the element of coercion. The Court emphasized that compulsion, either by force, influence or punishment, would not be tolerated. Arguably, if the Court struck down the New Jersey statute, thereby disallowing transportation for children attending parochial schools, it would have allowed government to wield its coercive power over its citizens, in effect, by permitting it to "force [students] . . . to remain away from church against [their] will" and at the same time to punish its taxpaying citizens "for entertaining or professing religious beliefs" and "for church attendance."[37] The *Everson* Court found that actions such as these were not permissible.

In the following year, the Court was presented with another opportunity to expound upon its developing Establishment Clause jurisprudence in *Illinois ex. rel. McCollum v. Board of Education.*[38] The controversy in *McCollum*, brought by a resident taxpayer of an Illinois school district, centered around a Board of Education practice which allowed members of the Roman Catholic, Protestant and Jewish faiths to offer religious instruction to public school students once a week in public school classrooms upon written permission of the students' parents. Students who did not participate in the instruction were required to leave the classroom, and students who had received permission to attend the instruction were required to

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Sherr v. Northport-East Northport Union Free Sch. Dist., 672 F. Supp. 81 (E.D.N.Y. 1987); Bollenbach v. Board of Educ., 659 F. Supp. 1450 (S.D.N.Y. 1987); United Christian Scientists v. Christian Science Bd. of Directors, 616 F. Supp. 476 (D.D.C. 1985); Walter v. West Virginia Bd. of Educ., 610 F. Supp. 1169 (S.D. W. Va. 1985); McCarthy v. Hornbeck, 590 F. Supp. 936 (D. Md. 1984); Zwerling v. Reagan, 576 F. Supp. 1373 (C.D. Cal. 1983); Duffy v. Las Cruces Pub. Sch., 557 F. Supp. 1013 (D.N.M. 1983); Doe v. Aldine Indep. Sch. Dist., 563 F. Supp. 883 (S.D. Tex. 1982); Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982); McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982); Voswinkel v. City of Charlotte, 495 F. Supp. 588 (W.D.N.C. 1980); Anderson v. General Dynamics Convair Aerospace Div., 489 F. Supp. 782 (S.D. Cal. 1980); Citizens Concerned for Separation of Church and State v. City and County of Denver, 481 F. Supp. 522 (D. Colo. 1979); Wiley v. Franklin, 468 F. Supp. 133 (E.D. Tenn. 1979); Gavin v. Peoples Natural Gas Co., 464 F. Supp. 622 (W.D. Pa. 1979); Malnak v. Yogi, 440 F. Supp. 1284 (D.N.J. 1977); Goodwin v. Cross Country Sch. Dist. No. 7, 394 F. Supp. 417 (E.D. Ark. 1973); Wilder v. Sugarman, 385 F. Supp. 1013 (S.D.N.Y. 1974); Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 872 (D. Kan. 1974); Anderson v. Salt Lake City Corp., 348 F. Supp. 1170 (D. Utah 1972); Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio 1972); Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969); United States v. McFadden, 309 F. Supp. 502 (N.D. Cal. 1970); Koster v. Sharp, 303 F. Supp. 837 (E.D. Pa. 1969); Goodson v. Northside Bible Church, 261 F. Supp. 99 (S.D. Ala. 1966); Schempp v. Abington, 177 F. Supp. 398 (E.D. Pa. 1959).

Given the extensive reliance on *Everson's* articulated meaning of the Establishment Clause, the coercion analysis appeared to be firmly rooted in Establishment Clause jurisprudence.

37. *Everson*, 330 U.S. at 15-16.

38. 333 U.S. 203 (1948).

be present.[39]

The Court struck down the program as violative of the Establishment Clause. The decision in *McCollum* was based primarily upon a finding of governmental coercion in the form of the education system's compulsory attendance laws.[40] In Illinois, as in most states, secular education attendance was compulsory. The Court noted that where students "compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. . . . [there exists] beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups . . . ."[41] This type of coercion constituted an impermissible violation of the First Amendment.

Four years later, the Court revisited the underpinnings of its Establishment Clause jurisprudence in *Zorach v. Clauson*.[42] The controversy in *Zorach* centered around a New York State education law which permitted New York City public schools to release students to attend religious classes upon written request of their parents. Students who were not released were required to stay in the classroom, and the students who were released were required to report to the religious instruction.[43] The facts in *Zorach* were distinguishable from the facts in *McCollum* in two respects: in *Zorach*, the program did not involve religious instruction on public school premises, and there was no expenditure of public funds.

The Supreme Court held that this program did not violate the First Amendment. The Court based its finding upon the lack of evidence that "the system involves the use of coercion to get public school students into religious classrooms."[44] The Court added, however, that "[i]f in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case

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39. *Id.* at 209. The gravamen in *McCollum* was the constitutionality of using tax-supported public schools for sectarian religious instruction. *Id.* at 209-10.

40. The Court concluded that the use of tax-supported public schools and the compulsory attendance laws for sectarian religious purposes clearly violated the First Amendment. According to the Court: "The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects." *Id.* at 209. Further, "[t]he State . . . affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery." *Id.* at 212. The *McCollum* Court held that "[t]his is not separation of Church and State." *Id.*

41. *Id.* at 209-10.

42. 343 U.S. 306 (1952).

43. *Id.* at 308.

44. *Id.* at 311. According to the Court, "the school authorities are neutral in this regard and do no more than release students whose parents so request." *Id.*

would be presented."[45]

The distinction the Court made between its decisions in *Zorach* and *McCollum* was based entirely on the element of governmental coercion. In *McCollum*, the use of the state's compulsory education system to further religious education was the factor that proved fatal to the Illinois practice. In *Zorach*, the state's compulsory education system was not used to further the aims of religious education nor was any other form of governmental coercion employed. Therefore, New York's practice survived constitutional scrutiny.

The Court's Establishment Clause jurisprudence in its formative years was inextricably linked to the historical origins provided by Madison and Jefferson and, as a result, rested its rational foundations upon the coercion analysis. In order for a state practice to be deemed a violation of the Establishment Clause, a showing of governmental coercion or compulsion to religious belief or practice was necessary. This analytical framework was witnessed in *Everson*, *McCollum* and *Zorach*. In 1962, however, the Court began to reject the coercion analysis in favor of a new framework.

II. REJECTION OF THE COERCION ANALYSIS AND CREATION OF THE *LEMON* TEST

A. *Rejection of the Coercion Analysis in* Engel v. Vitale

The major shift in the Court's Establishment Clause jurisprudence, which consisted of an outright rejection of the coercion analysis and a movement toward the creation of a new analytical framework, began in 1962 with the landmark decision *Engel v. Vitale*.[46] In reaching this decision, the *Engel* Court essentially ignored all previous holdings which had been based upon a coercion theory, and instead relied "largely upon abstract theories and . . . *obiter dicta*—general and even casual statements in Supreme Court opinions in previous cases, which . . . were unnecessary to the decision of those cases and therefore are not valid as precedents binding the Court in subsequent cases."[47]

In *Engel*, the Respondent Board of Education had directed the school district's principal to ensure that a prayer, composed by the New York State Board of Regents, was said each day in the class-

45. *Id.*

46. 370 U.S. 421 (1962). For an in-depth analysis of the *Engel* decision, see JACOB MARCELLUS KIK, THE SUPREME COURT AND PRAYER IN THE PUBLIC SCHOOL (1963) and CHARLES E. RICE, SUPREME COURT AND PUBLIC PRAYER: THE NEED FOR RESTRAINT (1964).

47. RICE, *supra* note 46, at ix. According to Rice: "The Court quite naturally could find no solid foundations in history and legal precedent upon which to base th[e] result [in *Engel*]." *Id.*

room with the teacher present.[48] The parents of ten students brought an action alleging that the prayer violated the Establishment Clause of the First Amendment.[49]

The Supreme Court held that the New York Regents' Prayer violated the Establishment Clause.[50] The Court, in dicta, then proceeded to eliminate the coercion analysis from its Establishment Clause jurisprudence. According to the majority: "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether [the] laws operate directly to coerce nonobserving individuals or not."[51]

Engel denied that coercion was a necessary element in determining an Establishment Clause violation. As a result, *Engel* severed coercion—the basis upon which prior case law had been anchored[52]—from Establishment Clause jurisprudence. The Justices in *Engel*, however, may not have realized the ramifications of their decision.[53] Nevertheless, the decision in *Engel* set the Court's Estab-

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48. The prayer's language was as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Engel*, 370 U.S. at 422.

49. The Supreme Court noted that the New York State Court of Appeals found the prayer to be constitutional "so long as the schools did not compel any pupil to join in the prayer over his or his parents' objection." *Id.* at 423 (citing Engel v. Vitale, 176 N.E.2d 579, 581 (N.Y. 1961)). According to New York's highest court, since there was no finding of compulsion on the part of the school, the practice would not be considered a violation of the First Amendment Establishment Clause. The New York State Court of Appeals' decision was in line with earlier Supreme Court precedents which utilized a coercion analysis. *See, e.g.*, cases cited *supra* note 36. However, on appeal, the Supreme Court did not base its decision on such precedents.

50. The Court noted that "[t]here can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer." *Engel*, 370 U.S. at 430. The Court added: "Neither the fact that the prayer [is] denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause . . . ." *Id.*

51. *Id.* Despite the Court's holding that coercion was not a necessary element in determining the occurrence of an Establishment Clause violation, the Court went on to recognize that coercion was, in fact, implicit in *Engel*:

> This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that.

Id. at 430-31.

52. *See* discussion *supra* part I.

53. It does not appear that the *Engel* Court entirely intended to place Establishment Clause doctrine on the path it subsequently traveled. In a footnote, the Court stated:

> There is of course nothing in the decision reached here that is inconsistent with

lishment Clause jurisprudence on a path not previously envisioned—a path the Court is still attempting to comprehend.

B. *The Path to* Lemon v. Kurtzman

Following the *Engel* decision, the Court no longer based its jurisprudence on the requirement that coercion must be shown to prove that a state or federal practice violated the Establishment Clause. In subsequent decisions, the Court developed novel strains in its Establishment Clause doctrine which would ultimately be conjoined to create a new test.

One year after *Engel*, the Supreme Court was presented with another Establishment Clause question in *Abington v. Schempp*.[54] In *Schempp*, the Court was asked to resolve the issue of whether a state could statutorily require Bible readings or the recitation of the Lord's Prayer in public school classrooms.[55] The Court found that

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> the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

Engel, 370 U.S. at 435 n.21. It may, however, have served the Court well to place the thoughts expressed in the footnote into the text of the decision, as footnotes are often overlooked.

Public outcry with respect to the *Engel* decision was immediate. "A Connecticut minister called Chief Justice Warren the anti-Christ, and from his pulpit he urged Warren's impeachment, in support of which six hundred seventy-four members of his congregation joined in signing a petition." FENWICK, *supra* note 2, at 130 (footnote omitted). "A South Carolina Congressman proposed a bill to require that the words 'In God We Trust' be inscribed above the bench of the Supreme Court, to remind the justices that 'there is an Authority higher than that of the Supreme Court of the United States.'" *Id.* (footnote omitted). For a discussion of the approach taken by certain towns to completely defy the Court's decision in *Engel*, see KENNETH M. DOLBEARE & PHILIP E. HAMMOND, THE SCHOOL PRAYER DECISIONS (1971).

Additionally, 146 resolutions designed to permit prayer in public schools by Constitutional amendment were introduced in Congress after the Supreme Court's decisions in *Engel* and Abington v. Schempp, 374 U.S. 203 (1963), which is discussed *infra* notes 54-59 and accompanying text. *See* PROPOSED AMENDMENTS TO THE CONSTITUTION RELATING TO SCHOOL PRAYERS, BIBLE READING, ETC.: A STAFF STUDY FOR THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES (1964).

54. 374 U.S. 203 (1963).

55. *Schempp* was decided together with a companion case, Murray v. Curlett, 374 U.S. 203 (1963), which challenged a similar practice in Maryland. For an extensive inquiry into the Bible reading controversy, see DONALD E. BOLES, THE BIBLE, RELIGION AND THE PUBLIC SCHOOLS (1965).

The challenged Pennsylvania statute required that "[a]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each

the statutes required religious exercises in violation of the individuals' rights and were, therefore, violations of the Establishment Clause. The Court based its finding on the concept of strict neutrality: "Government [must] maintain strict neutrality [by] neither aiding nor opposing religion."[56] The Court rejected the coercion analysis, emphatically declaring that "a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."[57] The Court instead articulated that the Establishment Clause mandates that all legislation have a secular purpose and prohibits any legislation which advances or inhibits religion.[58]

The *Schempp* Court clearly deviated from all pre-*Engel* cases which had been decided on the premise that coercion was an element in determining whether an Establishment Clause violation had occurred.[59] New foundations of jurisprudence, devoid of any requirement of governmental coercion, were emerging.

The Court expounded upon its developing post-*Engel* jurisprudence in *Walz v. Tax Commission*.[60] In *Walz*, a New York City Tax Commission practice granting property tax exemptions to religious organizations was challenged.[61] The Supreme Court upheld New

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school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." PA. STAT. ANN. tit. 24, § 15-1516 (1992). The Schempp family, members of the Unitarian faith, brought the action alleging that the statute violated the First and Fourteenth Amendments. Mr. Schempp stated that he had considered excusing his children from the religious exercise but thought that this would impact negatively on his children's relationships with their teachers and their peers. *Schempp*, 374 U.S. at 205-08.

The challenged Maryland practice "provided for the holding of opening exercises in the schools of the city, consisting primarily of the 'reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer.'" *Id.* at 211. This rule was amended to provide that "[a]ny child shall be excused from participating in the opening exercises or from attending the opening exercises upon the written request of his parent or guardian." *Id.* at n.4. The petitioners in *Murray*, Mrs. Murray and her son, were professed atheists and argued that the statute, even as amended to allow for students to be excused, contravened their First Amendment right of freedom of religion. *Id.* at 211-12.

56. *Schempp*, 374 U.S. at 225.

57. *Id.* at 223.

58. *Id.* at 222. Writing for the majority, Justice Clark observed:

> The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Id. (citations omitted).

59. *See* cases discussed *supra* part I.B.

60. 397 U.S. 664 (1970).

61. According to the appellant, a real estate owner, such an exemption indirectly required him to make a contribution to religious bodies through his tax dollars and, there-

York City's practice, finding that "[t]he legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility."[62] The Court went on to state that "[d]etermining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion."[63]

After the Court's decision in *Schempp*, the Establishment Clause test consisted of two distinct components. In order for a state or federal government practice to remain consistent with the First Amendment, it had to have both a secular legislative purpose and remain neutral in its religious effect.[64] *Walz* expounded upon that test by adding a third component: The state or federal practice must also not lead to "excessive government entanglement with religion."[65] Conjoined, these two decisions provided the requisite criteria upon which a new Establishment Clause framework of analysis would be based.

C. Lemon *and its Progeny*

The post-*Engel* rejection of the coercion analysis culminated with a formal articulation of a new analytical framework in *Lemon v. Kurtzman*.[66]

At issue in *Lemon* was the constitutionality of the Rhode Island Salary Supplement Act, which provided salary supplements to teachers in nonpublic schools,[67] and the Pennsylvania Nonpublic Elementary and Secondary Education Act, which permitted superintendents of public schools to purchase secular educational services from nonpublic schools.[68] Appellants brought suit alleging that these statutes violated the Establishment Clause.[69]

The Supreme Court announced that "[e]very analysis in this area must begin with consideration of the cumulative criteria devel-

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fore, constituted a violation of the First Amendment prohibition against the establishment of religion. *Id.* at 667.

62. *Id.* at 672.

63. *Id.* at 674.

64. *See supra* note 58 and accompanying text.

65. *Walz*, 397 U.S. at 674; *see supra* note 63 and accompanying text.

66. 403 U.S. 602 (1971).

67. *Id.* at 607.

68. *Id.* at 609.

69. The funds for the Pennsylvania program originated from a tax on horse and harness racing. One of the appellants in *Lemon* argued that in addition to being a resident, a taxpayer, and a parent of a student, he had also purchased a race-track ticket and, therefore, paid the tax which directly supported the Pennsylvania act. *Id.* at 611.

oped by the Court over many years."[70] The Court determined that "[t]hree such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[71] The Court concluded that both statutes were unconstitutional because the "cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion."[72] In *Lemon*, the Court articulated a three-pronged test which would guide Establishment Clause jurisprudence for the next twenty years.[73]

The Court clarified the application of the *Lemon* test in *Stone v. Graham*.[74] In *Stone*, a Kentucky statute, which required the posting of the Ten Commandments in each public school classroom, was challenged.[75] Petitioners argued that the statute was in direct conflict with the Establishment Clause of the First Amendment.[76]

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70. *Id.* at 612. Despite this declaration, the Court neglected to examine the criteria that had been used by the Court prior to the *Engel* decision. These criteria are discussed *supra* part I.B.

71. *Lemon*, 403 U.S. at 612-13 (citation omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). The Court combined the requirements articulated in *Schempp*, discussed *supra* notes 54-59 and accompanying text, with the additional criterion utilized in *Walz*, discussed *supra* notes 60-63 and accompanying text, to create the *Lemon* test.

72. *Lemon*, 403 U.S. at 614. Therefore, the Court found that the statutory scheme violated the third prong of the *Lemon* test.

73. Simply stated, for a governmental practice to survive constitutional scrutiny, the *Lemon* test required that the practice must: (1) have a secular legislative purpose; (2) not enhance or inhibit religion; and (3) not foster excessive entanglement with religion. *Id.* at 612-13.

74. 449 U.S. 39 (1980).

75. The statute provided:

> (1) It shall be the duty of the Superintendent of Public Instruction, provided sufficient funds are available as provided in subsection (3) of this section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.
>
> (2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."
>
> (3) The copies required by this section shall be purchased with funds made available through voluntary contributions made to the State Treasurer for the purposes of this section.

KY. REV. STAT. ANN. § 158.178 (Michie/Bobbs-Merrill 1992). By stating the secular purpose of the posting of the Ten Commandments, the drafters of the Kentucky statute hoped that it would pass the first prong of the *Lemon* test. FENWICK, *supra* note 2, at 179.

76. *Stone*, 449 U.S. at 39-40.

In reaching its decision, the Court relied upon the three-pronged *Lemon* test and definitively stated: "If a statute violates any of these three principles, it must be struck down under the Establishment Clause."[77] The Court concluded that "Kentucky's statute requiring the posting of the Ten Commandments in public school rooms had no secular legislative purpose, and [was] therefore unconstitutional."[78]

The *Lemon* test was applied similarly five years later in *Wallace v. Jaffree*,[79] a case which examined an Alabama statute authorizing a period of silence for meditation or voluntary prayer.[80] The *Wallace* Court noted that "[w]hen the Court has been called upon to construe the breadth of the Establishment Clause, it has examined the criteria developed over a period of many years."[81] After restating the three-part *Lemon* test, the Court concluded that "[i]t is the first of these three criteria that is most plainly implicated by this case.... [N]o consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose."[82] The statute, therefore, violated the Establishment Clause.

One additional case, *Edwards v. Aguillard*,[83] merits discussion for its application of the *Lemon* test. The issue presented in *Edwards* concerned the Louisiana Creationism Act, which required that creation science and evolution science be given equal treatment in schools.[84] Parents of students, teachers, and religious leaders challenged the constitutionality of the Act.[85] The Court ultimately struck down the Act as violating the Establishment Clause of the First Amendment.

The Court reached this conclusion through an application of the

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77. *Id.* at 40-41.

78. *Id.* at 41. According to the per curiam opinion of the Court: "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." *Id.* Therefore, the statute "serves no [permissible] educational function." *Id.* at 42.

79. 472 U.S. 38 (1985).

80. For a discussion of *Wallace*, see David Lubecky, *Silent Moments in Public Schools:* Wallace v. Jaffree, 54 U. CIN. L. REV. 1405 (1985); Sylvia S. Penneys, *And Now For A Moment of Silence:* Wallace v. Jaffree, 39 U. MIAMI L. REV. 935 (1985).

81. *Wallace*, 472 U.S. at 55. As in *Lemon*, the Court neglected the criteria that had been established prior to the *Engel* decision. *Id.*; *see supra* note 70 and accompanying text.

82. *Wallace*, 472 U.S. at 56. The Court found that a moment of silence could not be construed as having a secular legislative purpose. *Id.*

83. 482 U.S. 578 (1987). For a discussion of the *Edwards* decision, see Juliana S. Moore, Note, *The* Edward's [sic] *Decision: The End of Creationism in our Public Schools?*, 21 AKRON L. REV. 255 (1987).

84. *Edwards*, 482 U.S. at 581. Under the Creationism Act, no school was required to teach either evolution or creation science. If one was taught, however, the other had to be taught. *Id.*

85. *Id.*

Lemon test and noted that "[i]n this case, the Court must determine whether the Establishment Clause was violated in the special context of the public elementary and secondary school system."[86] The Court found the statute violated the Establishment Clause under the first and second prongs of *Lemon*, as it served "no clear secular purpose,"[87] and its primary purpose advanced "a particular religious belief."[88]

Although firmly established as the mechanism for deciding Establishment Clause questions,[89] the *Lemon* test began to be criticized by scholars, critics, and observers of the Court. More importantly, criticism emerged from the Supreme Court.

III. DISSATISFACTION WITH THE *LEMON* TEST

Over time, *Lemon* proved to be a difficult framework to apply, and its application was, at best, "unclear and unpredictable."[90] As a

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86. *Id.* at 583. Justice Brennan, writing for the majority, commented:

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Id. at 583-84.

87. *Id.* at 585.

88. *Id.* at 593.

89. Numerous decisions after *Lemon* were decided through the use of its three-pronged analytical framework. *See* Bowen v. Kendrick, 487 U.S. 589 (1988); Edwards v. Aguillard, 482 U.S. 578 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985); Lynch v. Donnelly, 465 U.S. 668 (1984); Doe v. Small, 934 F.2d 743 (7th Cir. 1991); Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991); Southside Fair Hous. Comm. v. City of New York, 928 F.2d 1336 (2d Cir. 1991); Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990); ACLU v. County of Allegheny, 842 F.2d 655 (3d Cir. 1988); Smith v. Board of Sch. Comm'rs, 827 F.2d 684 (11th Cir. 1987); Friedman v. Board of County Comm'rs, 781 F.2d 777 (10th Cir. 1985); Carpenter v. San Francisco, 803 F. Supp. 337 (N.D. Cal. 1992); Smith v. Lindstrom, 699 F. Supp. 549 (W.D. Va. 1988); New Life Baptist Church Acad. v. Town of East Longmeadow, 666 F. Supp. 293 (D. Mass. 1987); Bollenbach v. Board of Educ., 659 F. Supp. 1450 (S.D.N.Y. 1987); Van Zandt v. Thompson, 649 F. Supp. 583 (N.D. Ill. 1986); ACLU v. Eckels, 589 F. Supp. 222 (S.D. Tex. 1984). In fact, the Court used the *Lemon* test in every Establishment Clause case except Marsh v. Chambers, 463 U.S. 783 (1983), which upheld a chaplain's invocation before the Nebraska Legislature on the basis of the historical traditions surrounding such an activity.

90. Timothy V. Franklin, *Squeezing the Juice Out of the* Lemon *Test*, 72 EDUC. L. REP. 1, 3 (1992). According to Franklin: "The literal language of *Lemon* has remained intact but the meaning attached to each of the three test questions has fluctuated depending on which Justice wrote the Court's decision." *Id.* at 2 (footnote omitted). The various ways in which the *Lemon* test has been applied and interpreted have resulted in decisions which can only be described as contradictory. For example, Lynch v. Donnelly, 465 U.S. 668 (1984), which is discussed *infra* note 116, and County of Allegheny v. ACLU, 492 U.S.

result, several Supreme Court Justices questioned whether *Lemon* should be retained as the proper framework of analysis in deciding Establishment Clause questions.

In *Wallace v. Jaffree*,[91] Justice Rehnquist, writing in dissent, presented himself as a strong critic of *Lemon*. According to Justice Rehnquist, the *Lemon* test "has no more grounding in the history of the First Amendment than does the wall theory upon which it rests."[92] Justice Rehnquist criticized the metaphor of "[t]he 'wall of separation between church and State' . . . [as] a metaphor based on bad history . . . which has proved useless as a guide to judging."[93] Therefore, "[i]t should be frankly and explicitly abandoned."[94]

In *Grand Rapids School District v. Ball*,[95] Justice White reiterated his long-standing criticism of the *Lemon* test when he pointedly stated:

> As evidenced by my dissenting opinions in *Lemon v. Kurtzman* and *Committee for Public Education & Religious Liberty v. Nyquist*, I have long disagreed with the Court's interpretation and application of the Establishment Clause in the context of state aid to private schools. For the reasons stated in those dissents, I am firmly of the belief that the Court's decisions in these cases, like its decisions in *Lemon* and *Nyquist*, are "not required by the First Amendment and [are] contrary to the long range interests of the country."[96]

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573 (1989), which is discussed *infra* notes 111-28 and accompanying text, were both decided under the *Lemon* framework, yet led to opposite conclusions. *Lynch* upheld the constitutionality of a creche display, 465 U.S. at 685, while *Allegheny* invalidated a creche display, 492 U.S. at 601-02.

91. 472 U.S. 38 (1985). *Wallace* is discussed *supra* notes 79-82 and accompanying text. The majority in *Wallace* applied the *Lemon* test and held that a moment of silence violated the first prong of the test, and, therefore, the Establishment Clause, since it did not have a secular purpose. *Wallace*, 472 U.S. at 55-56.

92. *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting).

93. *Id.* at 107. Historically, the origin of the metaphor has been credited to Thomas Jefferson. *See supra* note 25. This metaphor was first employed by the Supreme Court to decide an Establishment Clause question in Reynolds v. United States, 98 U.S. 145, 164 (1878) (holding that laws prohibiting bigamy did not amount to an unconstitutional "establishment" of religion).

94. *Wallace*, 472 U.S. at 107 (Rehnquist, J., dissenting).

95. 473 U.S. 373 (1985). At issue in *Grand Rapids* were two programs adopted by the school district. Under these programs, classes taught by private school teachers were offered in private school classrooms at the public taxpayers' expense, mainly at schools the court characterized as "identifiably religious." *Id.* at 373. The majority in *Grand Rapids* applied the *Lemon* test and concluded that both programs impermissibly involved the government's support of sectarian religion. The programs had the primary effect of advancing religion in violation of the second prong of the *Lemon* test and, therefore, violated the Establishment Clause. *Id.* at 397. For a general discussion of the Court's decision in *Grand Rapids*, see Thomas E. Elfere, *Lead Us Not Into Confusion: Michigan School Code v. Supreme Court Policy*, 64 U. DET. L. REV. 225 (1986).

96. *Grand Rapids*, 473 U.S. at 400 (White, J., dissenting) (quoting Committee of

In addition to Chief Justice Rehnquist and Justice White, Justice Scalia also has criticized the Court's continued use of the *Lemon* test in deciding Establishment Clause cases.[97] In *Edwards v. Aguillard*,[98] Justice Scalia dissented, expressing his "doubt whether th[e] 'purpose' requirement of *Lemon* is a proper interpretation of the Constitution."[99] Recently, in a bitter dissent in *Lee v. Weisman*,[100] Justice Scalia outwardly favored the "interment"[101] of the *Lemon* test.

In *County of Allegheny v. American Civil Liberties Union*,[102] Justice Kennedy emerged as a vehement critic of the *Lemon* test and the principal spokesman for the readoption of the coercion analysis.[103] Justice Kennedy did "not wish to be seen as advocating, let

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Pub. Educ. v. Nyquist, 413 U.S. 756, 820 (1973)) (citations omitted) (alteration in original). Justice White also conveyed a similar message in *Roemer v. Board of Public Works*, stating: "I am no more reconciled now to *Lemon* . . . than I was when it was decided. . . . The threefold test of *Lemon* . . . imposes unnecessary, and . . . superfluous tests for establishing 'when the State's involvement with religion passes the peril point' for First Amendment purposes." 426 U.S. 736, 768 (1976) (White, J., concurring) (quoting *Nyquist*, 413 U.S. at 822).

97. *See* Jay Schlosser, Note, *The Establishment Clause and Justice Scalia: What the Future Holds for Church and State*, 63 NOTRE DAME L. REV. 380 (1988).

98. 482 U.S. 578 (1987). *Edwards* is discussed *supra* notes 83-88 and accompanying text. The majority in *Edwards* utilized the *Lemon* framework to strike down a statutory requirement that creation science and evolutionary science be given equal treatment in the schools. The Court found such a legislative mandate to be without a secular purpose and to advance religion in violation of the second prong of *Lemon*. As a result, the mandate was prohibited by the Establishment Clause. *Edwards*, 482 U.S. at 597.

99. *Edwards*, 482 U.S. at 613 (Scalia, J., dissenting). According to Justice Scalia, "pessimistic evaluation . . . of the totality of *Lemon* is particularly applicable to the 'purpose' prong . . . ." *Id.* at 636. Justice Scalia concluded his dissent in *Edwards* by stating: "In the past we have attempted to justify our embarrassing Establishment Clause jurisprudence on the ground that it 'sacrifices clarity and predictability for flexibility.' . . . I think it time that we sacrifice some 'flexibility' for 'clarity and predictability.' Abandoning *Lemon*'s purpose test . . . would be a good place to start." *Id.* at 639-40 (footnote omitted) (quoting Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980)).

100. 112 S. Ct. 2649 (1992). *Lee* is discussed *infra* part V. The majority in *Lee* essentially ignored the *Lemon* test and declared school-sponsored invocations and benedictions offered at high school commencement ceremonies unconstitutional because the Court found that their use coerced student participation in a religious exercise. *Lee*, 112 S. Ct. at 2661.

101. *Lee*, 112 S. Ct. at 2685 (Scalia, J., dissenting). See *infra* notes 155, 159 for a discussion of Justice Scalia's criticism of the majority opinion in *Lee*.

102. 492 U.S. 573 (1989). *Allegheny* is discussed *infra* notes 111-28 and accompanying text. The *Allegheny* majority applied the *Lemon* test and upheld the constitutionality of a menorah display while striking down a creche display under the second prong of the *Lemon* test, since the principal or primary effect of the creche display was to advance religion. *Allegheny*, 492 U.S. at 601.

103. *Allegheny*, 492 U.S. at 659-63 (Kennedy, J., concurring in part, dissenting in part). Justice Kennedy's opinion is discussed *infra* notes 119-28 and accompanying text.

alone adopting, [the *Lemon*] test as [the] primary guide in this difficult area."[104]

Justice O'Connor also has voiced her dissatisfaction with the *Lemon* test.[105] In *Lynch v. Donnelly*,[106] Justice O'Connor proposed a modification to *Lemon*, which has come to be known as the endorsement test:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions .... The second and more direct infringement is government endorsement or disapproval of religion.[107]

Justice Blackmun cited Justice O'Connor's endorsement test with approval in the majority opinion in *County of Allegheny v. American Civil Liberties Union*,[108] indicating that he too is in favor of a modification of *Lemon*.

Despite its longstanding position as the test for determining Establishment Clause violations, *Lemon*'s applicability has been questioned by several members of the Supreme Court. Many of the Supreme Court Justices, in concurring and dissenting opinions in the late 1980s, began to advocate the use of the coercion analysis as an alternative to what they perceived as the unworkable *Lemon* framework.[109]

See Keith O. McArtor, Comment, *A Conservative Struggles with* Lemon*: Justice Anthony M. Kennedy's Dissent in* Allegheny, 26 TULSA L.J. 107 (1990).

104. *Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in part, dissenting in part).

105. *See* Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049 (1986); W. Scott Simpson, Lemon *Reconstituted: Justice O'Connor's Proposed Modifications of the* Lemon *Test for Establishment Clause Violations*, 1986 B.Y.U. L. REV. 465 (1986).

106. 465 U.S. 668 (1984). *Lynch* is discussed *infra* note 116. The *Lynch* majority upheld a creche display as constitutional based upon the holiday environment in which it was displayed.

107. *Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring) (citation omitted). Justice O'Connor's endorsement test eliminates the first prong of the *Lemon* test, which requires that a governmental practice demonstrate a secular purpose. The endorsement test, however, essentially retains the second and third prongs of *Lemon*, which are concerned with endorsement—government's advancement of and excessive entanglement with religion.

108. 492 U.S. 573, 575 (1989).

109. As evidenced in the judicial opinions of Chief Justice Rehnquist, Justice Blackmun, Justice White, Justice O'Connor, Justice Scalia and Justice Kennedy, discontentment prevailed over the Court's continued use of the *Lemon* framework. In the late 1980s, the coercion analysis began to reemerge.

IV. REEMERGENCE OF THE COERCION ANALYSIS

Although rejected by the Supreme Court for some time,[110] the coercion analysis reappeared in an opinion written by Justice Kennedy in *County of Allegheny v. American Civil Liberties Union*.[111] The case considered the constitutionality of two holiday displays[112] in Pittsburgh: a creche[113] and a menorah.[114] The American Civil Liberties Union and residents of the city of Pittsburgh initiated an action to ban the displays in question on the grounds that they constituted an establishment of religion prohibited by the First Amendment.[115]

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110. *See* discussion *supra* part II.A-B (recounting the Court's denial that coercion must exist in order for a government practice to violate the Establishment Clause).

111. 492 U.S. 573, 655-79 (1989) (Kennedy, J., concurring in part, dissenting in part). *Allegheny* was heard together with *Chabad v. American Civil Liberties Union* and *City of Pittsburgh v. American Civil Liberties Union*. For analysis of *Allegheny* and its companion cases, see Richard A. LaCroix, County of Allegheny v. American Civil Liberties Union: *How the Bench Stole Christmas*, 25 NEW ENG. L. REV. 523 (1990); David O. Stewart, *Rules of Yule*, 75 A.B.A. J., Nov. 1989, at 50.

112. Although this case does not involve an Establishment Clause violation within school environs, it is imperative to undertake an examination of the decision, as the analysis advocated by Justice Kennedy in *Allegheny* is central to subsequent Establishment Clause cases dealing with religion in the school context, particularly Lee v. Weisman, 112 S. Ct. 2649 (1992), which is discussed *infra* part V.

113. A creche is a visual representation of the Bethlehem nativity scene after the birth of Jesus Christ. It depicts the Virgin Mary, Joseph and the Christ child, as well as animals, shepherds and wise men. *Allegheny*, 492 U.S. at 580 (citing *Luke* 2:1-21; *Matthew* 2:1-11).

The creche in *Allegheny* was owned by the Holy Name Society, a Roman Catholic organization, and was displayed annually on the staircase of the Allegheny County Courthouse. *Id.* at 579. At the pinnacle of the creche display was an angel holding a banner which read: "Gloria in Excelsis Deo," meaning "Glory to God in the Highest." *Id.* at 580 & n.5. As the Court noted: "It is unlikely that an observer standing at the bottom of the Grand Staircase would be able to read the text of the angel's banner from that distance, but might be able to do so from a closer vantage point." *Id.* at n.5.

114. A menorah is a nine-branched candelabrum used during the Jewish festival of Chanukah to celebrate the Macabees' rededication of the Temple of Jerusalem after recapturing it from the Greeks. *Id.* at 582-83 nn.9 & 14-20. "Chanukah is the annual Jewish holiday that falls closest to Christmas Day each year." *Id.* at 582.

In *Allegheny*, an 18-foot menorah was displayed at the entrance of City Hall next to the city's 45-foot Christmas tree. The menorah, although owned by Chabad, a local Jewish organization, was "stored, erected, and removed [annually] by the city." *Id.* at 587.

115. The district court denied the respondents' request that the city and county be enjoined from displaying such religious items. Relying on Lynch v. Donnelly, 465 U.S. 668 (1984), which is discussed *infra* note 116, the court held that the creche and the menorah were simply part of a holiday display. The court of appeals reversed, holding that the creche and menorah were patently Christian and Judaic symbols, and, therefore, their display by the city and county violated the second prong of the *Lemon* test because the practice's principal effect enhanced religion. County of Allegheny v. ACLU, 842 F.2d 655 (3d Cir. 1988). The Supreme Court granted certiorari. County of Allegheny v. ACLU, 488 U.S. 816 (1988).

The Supreme Court majority declared that the creche display was unconstitutional under the second prong of the *Lemon* test, because the principal effect of the display was to advance religion.[116] The Court, however, sustained the constitutionality of the menorah. The Court found that "the menorah's message is not exclusively religious."[117] Additionally, the menorah in *Allegheny* was displayed near a Christmas tree, creating a holiday setting similar to the one upheld in *Lynch v. Donnelly*.[118]

Justice Kennedy's opinion,[119] concurring in part and dissenting in part,[120] discussed the coercion analysis at length and advocated its adoption as a replacement for the *Lemon* test.[121] According to Justice Kennedy, "[o]ur cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not . . . give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith . . . .'"[122] Justice Kennedy stated further:

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116. The Court found that Allegheny County had "chosen to celebrate Christmas in a way that ha[d] the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ." *Allegheny*, 492 U.S. at 601. The Court distinguished this case from Lynch v. Donnelly, 465 U.S. 668 (1984), which upheld the constitutionality of a creche display. In *Lynch*, the Supreme Court found a creche display constitutional based upon the environment in which it was located. *Lynch*, 465 U.S. at 680. The display in *Lynch* consisted of a series of figures and objects such as a Santa house, reindeer, candy canes, carolers, and a large banner which read: "Season's Greetings." *Id.* at 671. The *Lynch* majority found that the government was simply sponsoring a celebration of the holiday season. *Id.* at 681. In *Allegheny*, however, there was only the presence of a creche, constituting a solely religious message impermissible under the First Amendment. "Here, unlike in *Lynch*, nothing in the context of the display detracts from the creche's religious message." *Allegheny*, 492 U.S. at 598.

117. *Allegheny*, 492 U.S. at 613. In the words of the majority: "The menorah is the primary visual symbol for the holiday that, like Christmas, has both religious and secular dimensions." *Id.* at 613-14. The Court analogized the display of the menorah to a display of a Christmas tree. *Id.* at 616. A Christmas tree at one time carried with it religious connotations derived from the Christian traditions. *Id.* However, today it simply symbolizes the secular celebration of Christmas. *Id.* at 617. Likewise, the menorah signifies "that Christmas is not the only traditional way of observing the winter-holiday season." *Id.*

118. 465 U.S. 668 (1984). *Lynch* is discussed *supra* note 116.

119. Writing his first Establishment Clause opinion, Justice Kennedy was joined by Chief Justice Rehnquist, Justice White, and Justice Scalia. *Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in part, dissenting in part).

120. According to Justice Kennedy, the majority's "view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents." *Id.*

121. Justice Kennedy commented that "[p]ersuasive criticism of *Lemon* has emerged," and that a "[s]ubstantial revision of our Establishment Clause doctrine may be in order." *Id.* at 656. Although he stated that such substantial revision was not necessary to decide *Allegheny*, Justice Kennedy, in effect, set the stage for a future revision of the Court's Establishment Clause doctrine.

122. *Id.* at 659 (alteration in original) (quoting *Lynch*, 465 U.S. at 678).

> These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.[123]

Justice Kennedy reintroduced the coercion analysis in much the same form as it existed prior to *Engel v. Vitale*.[124] He readily acknowledged that the coercion analysis had been used consistently in cases decided before *Engel*;[125] yet, he was also aware that "some of our recent cases reject the view that coercion is the sole touchstone of an Establishment Clause violation."[126] For Justice Kennedy, however, "[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal."[127] With respect to the facts in *Allegheny*, Justice Kennedy believed that the presence of both the creche and the menorah in public displays was constitutional since coercion was absent.[128]

With his opinion in *Allegheny*, Justice Kennedy revitalized the coercion analysis—an Establishment Clause framework which had

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123. *Id.* at 659-60.

124. 370 U.S. 421 (1962); *see* discussion *supra* part I (presenting the origins of the coercion analysis and its application by the Court up to its decision in *Engel*). The majority opinion in *Engel*, which is discussed *supra* notes 46-53 and accompanying text, severed the principle of coercion from Establishment Clause jurisprudence.

125. Justice Kennedy admitted:

> It is no surprise that without exception we have invalidated actions that further the interests of religion through the coercive power of government. . . . The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and the Free Exercise Clauses. Barring all attempts to aid religion through government coercion goes far toward attainment of this object.

Allegheny, 492 U.S. at 660 (citations omitted).

126. *Id.*; *see supra* text accompanying notes 51, 57.

127. *Allegheny*, 492 U.S. at 662. Thus, Justice Kennedy indicates that coercion is the primary factor to be considered in Establishment Clause analysis to determine if religious liberty has been infringed.

128. *Id.* at 655, 659-60. According to Justice Kennedy:

> There is no suggestion here that the government's power to coerce has been used to further the interests of Christianity or Judaism in any way. No one was compelled to observe or participate in any religious ceremony or activity. . . . The creche and the menorah are purely passive symbols of religious holidays. Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.
>
> There is no realistic risk that the creche and the menorah represent an effort to proselytize or are otherwise the first step down the road to an establishment of religion.

Id. at 664.

been neglected by the Court for many years. Justice Kennedy's opinion was consistent with the intent of the Framers, including Madison and Jefferson, and the Court's early jurisprudence prior to *Engel*.

In 1990, Justice Kennedy again returned to a discussion of the coercion analysis in *Board of Education v. Mergens*.[129] *Mergens* involved a local high school policy which allowed students to participate in recognized extracurricular groups that met after classes on school premises.[130] Bridget Mergens requested permission to form a Christian club.[131] Her request was denied by the school on the grounds that such a group would constitute an establishment of religion which would violate the First Amendment.

The Supreme Court upheld Bridget Mergens' right to form a Christian club and to meet on the same terms and conditions as existing student clubs. This decision was based upon the determination that the school's refusal constituted a denial of equal access guaranteed by federal law.[132]

Justice Kennedy concurred in part in the opinion and concurred in the judgment of the Court.[133] Although Justice Kennedy agreed that the school's compliance with the Equal Access Act would not be considered to violate the Establishment Clause, he reached this conclusion by applying a different analytical framework.[134] Justice

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129. 496 U.S. 226 (1990). For treatment of the Court's decision in *Mergens*, see Frank R. Jimenez, *Beyond* Mergens*: Ensuring Equality of Student Religious Speech Under the Equal Access Act*, 100 YALE L.J. 2149 (1991); Douglas Laycock, *The Students Won!: The Supreme Court Enforces the Equal Access Act*, QUARTERLY, Summer 1990, at 17.

130. *Mergens*, 496 U.S. at 231. Some of the extracurricular groups were, for example, the Band, the Future Business Leaders of America, the Speech and Debate Club, the Math Club, the Scuba Club, the Peer Advocates Service Program, the Photography Club, and the Chess Club. *Id.* at 253-58.

131. The purpose of the club would have been to read the Bible and pray. Membership would have been voluntary and open to all students regardless of religious affiliation. Furthermore, there would have been no faculty sponsor of the group. *Id.* at 232.

132. *Id.* at 253. The Equal Access Act, 20 U.S.C. §§ 4071-4074 (1984), was designed to ensure that student groups were afforded equal access within the school system. The Act provides, in relevant part, that a school allowing "noncurriculum related student groups" to meet may not lawfully discriminate against groups "on the basis of the religious, political, philosophical or other content of their speech." 20 U.S.C. § 4071(a). Congress enacted the Equal Access Act in response to the confusion which existed over the role of any type of religious speech or activity in the schools. The Act attempted to clarify the proper role of religion by accommodating both the students' interest in discussing their beliefs and the officials' interest in seeking to avoid religious endorsement. Jimenez, *supra* note 129, at 2150.

133. *Mergens*, 496 U.S. at 258 (Kennedy, J., concurring in part, concurring in the judgment). Justice Kennedy was joined by Justice Scalia. *Id.*

134. In his opinion in *Mergens*, Justice Kennedy stated that his "view of the analytic premise that controls the establishment question differs from that employed by the plu-

Kennedy felt it was important to determine first whether the Act violated either of two principles. For Justice Kennedy, the Act would be constitutionally valid if it did not confer benefits directly to a religion, and more importantly, if it did not coerce any students to participate in a religious activity.[135] In Justice Kennedy's view, the absence of any governmental coercion was demonstrated by the fact that neither principle was violated by the Act.[136] Justice Kennedy went on to discuss the coercion analysis and the careful attention that must be paid within the school context to determine whether governmental coercion is indeed involved.[137] Justice Kennedy maintained that since no such governmental coercion existed, Bridget Mergens' request to form a Christian club should be granted.[138]

In *Mergens*, Justice Kennedy again utilized the coercion analysis. In so doing, he attempted to influence the Court's Establishment Clause jurisprudence toward a foundation aligned once again with

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rality." *Id.*

135. As Justice Kennedy discussed:

> The accommodation of religion mandated by the Act is a neutral one, and in the context of this case it suffices to inquire whether the Act violates either one of two principles. The first is that the government cannot "give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" . . . The second principle controlling the case now before us, in my view, is that the government cannot coerce any student to participate in a religious activity.

Id. at 260 (citations omitted).

These are the same two principles which Justice Kennedy articulated in County of Allegheny v. ACLU, 492 U.S. 573 (1989). *See supra* text accompanying notes 122-23. Of these two principles, Justice Kennedy relied primarily upon the second principle, that a governmental practice must not be coercive, to reach his decision. *Mergens*, 496 U.S. at 260 (Kennedy, J., concurring in part, concurring in the judgment).

136. As Justice Kennedy opined:

> Nothing on the face of the Act or in the facts of the case as here presented demonstrates that enforcement of the statute will result in the coercion of any student to participate in a religious activity. The Act does not authorize school authorities to require, or even to encourage, students to become members of a religious club or to attend a club's meetings; the meetings take place while school is not in session, and the Act does not compel any school employee to participate in, or to attend, a club's meetings or activities.

Mergens, 496 U.S. at 261 (Kennedy, J., concurring in part, concurring in the judgment) (citations omitted).

137. Justice Kennedy maintained that evidence of government coercion within the school environment can be readily discerned:

> The inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in religious activity. This inquiry, of course, must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw.

Id. at 261-62.

138. *See id.* at 262.

the Framers' intent and thus with the Court's early Establishment Clause jurisprudence. After the decisions in *Allegheny* and *Mergens*, discussion increased concerning the use of the coercion analysis as the primary basis upon which Establishment Clause questions were to be decided.[139] In fact, many Court observers thought that the *Lemon* test would be explicitly overruled and the coercion analysis would reclaim its place in Establishment Clause jurisprudence in *Lee v. Weisman*.[140]

V. *LEE V. WEISMAN*

A. *Exposition*

One of the most widely discussed cases of recent Supreme Court terms, *Lee v. Weisman*,[141] involved the incorporation of invocations and benedictions into high school graduation ceremonies.[142] The appellee in *Lee*, Deborah Weisman, graduated from Nathan Bishop Middle School in June of 1989.[143] Her graduation ceremony

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139. Observers predicted that the Supreme Court would reconsider its approach to interpreting the religion clauses of the First Amendment. *See, e.g.*, Michael W. McConnell, *The Religion Clauses of the First Amendment: Where is the Supreme Court Heading?*, 187 CATH. LAW. 187 (1988); Nat Hentoff, *Will the Wall Come Tumbling Down?*, WASH. POST, Dec. 21, 1991, at A19.

140. 112 S. Ct. 2649 (1992). Prior to the decision in *Lee*, observers speculated that a significant change was likely to occur. *See* Richard Carelli, *Next Supreme Court Decision Could Mean Major Changes in Law*, PHILA. INQUIRER, May 4, 1992, at A2; Ruth Marcus, *Justices Accept Prayer Case that Poses New Constitutional Test for Religion*, WASH. POST, Mar. 19, 1991, at A14.

141. 112 S. Ct. 2649 (1992).

142. Prior to the decision in *Lee*, several lower courts had discussed the constitutionality of invocations and benedictions. In the following cases, the lower courts held that the deliverance of a religious invocation or benediction at public school sponsored events to which the public was invited or admitted violated the Establishment Clause: Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989), *cert. denied*, 109 S. Ct. 2431 (1990); Stein v. Plainwell Community Sch., 822 F.2d 1406 (6th Cir. 1987); Weisman v. Lee, 728 F. Supp. 68 (D.R.I.), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (1992); Graham v. Central Community Sch. Dist., 608 F. Supp. 531 (S.D. Iowa 1985); Doe v. Aldine Indep. Sch. Dist., 563 F. Supp. 883 (S.D. Tex. 1982). In the following cases, the lower courts held that invocations and benedictions at school sponsored events to which the public is invited, while religious in nature, did not violate the Establishment Clause of the First Amendment: Grossberg v. Deusebic, 380 F. Supp. 285 (E.D. Va. 1974); Wood v. Mt. Lebanon Township Sch. Dist., 342 F. Supp. 1293 (W.D. Pa. 1972); Weist v. Mt. Lebanon Sch. Dist., 320 A.2d 362 (Sup. Ct. Pa. 1974).

It was evident from these conflicting results that the lower courts desperately needed guidance from the Supreme Court in this area. The Supreme Court's grant of certiorari in *Lee* provided the opportunity for such guidance.

143. The "real origins" of the *Lee* case stemmed from the 1986 graduation of Merith Weisman, a sister of Deborah Weisman, from the Nathan Bishop Middle School. As members of the Jewish faith, the Weismans objected to the speaker's thanking Jesus Christ for the accomplishments of the students. Their objections, however, were not noted. Three

was held on school grounds and included an invocation and benediction delivered by Rabbi Leslie Gutterman.[144] Rabbi Gutterman began his invocation by addressing a deity and concluded with an "Amen."[145] The benediction opened in a similar fashion with an appeal to God's blessings and concluded with an "Amen."[146] The invocation and benediction taken together contained "a total of 252 words, with two references to 'God' and one reference to the 'Lord.'"[147]

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years later when the parents learned that a Rabbi would be offering prayers at the graduation of their younger daughter, Deborah, they again objected and this time took their case to the Supreme Court. James E. Wood, Jr., *Ceremonial Prayer at Public School Graduations:* Lee v. Weisman, 34 J. CHURCH & ST. 7, 8 (1992).

144. Rabbi Leslie Gutterman was the Rabbi of the Temple Beth El in Providence. *Lee*, 112 S. Ct. at 2652. The principal of the school, Robert Lee, had given Rabbi Gutterman a copy of "Guidelines for Civic Occasions" and advised him that the prayers should be nonsectarian. *Id.* However, the Weismans objected that "the prayers could be offensive and divisive, all the more so in a school system such as Providence in which more than half of the students are black, Hispanic, or Asian and many are Buddhist, Muslim, or Jewish." Wood, *supra* note 143, at 8.

145. *Lee*, 112 S. Ct. at 2652-53. Rabbi Gutterman's invocation was as follows:

> God of the Free, Hope of the Brave:
>
> For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.
>
> For the liberty of America, we thank You. May these new graduates grow up to guard it.
>
> For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.
>
> For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.
>
> May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.
>
> Amen.

Id.

146. *Id.* at 2653. Rabbi Gutterman's benediction was as follows:

> O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.
>
> Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.
>
> The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.
>
> We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.
>
> Amen.

Id.

147. Ralph D. Mawdsley & Charles J. Russo, *High School Prayers at Graduation: Will the Supreme Court Pronounce the Benediction?*, 69 EDUC. L. REP. 189, 191 (1991).

Deborah Weisman subsequently became a high school student at Classical High School, and it appeared that invocations and benedictions would again be included as part of her high school's graduation program. In July 1989, Deborah's father, Daniel Weisman, filed an amended complaint seeking a permanent injunction barring the school district from inviting clergy to deliver invocations and benedictions at all future graduations.

Utilizing the *Lemon* test, the District Court for Rhode Island held that the inclusion of invocations and benedictions in public school graduation ceremonies violated the Establishment Clause of the First Amendment, because their use served to advance religion.[148] The Court of Appeals for the First Circuit affirmed the decision of the district court as "sound and pellucid . . . [and saw] no reason to elaborate further."[149] The United States Supreme Court granted certiorari.[150]

Justice Kennedy authored the opinion for the Supreme Court.[151] Justice Kennedy, who had suggested just three years prior in *Allegheny* that the existing Establishment Clause doctrine may need to be reconsidered by the Court,[152] began the opinion for the majority by pointedly stating: "This case does not require us to revisit the difficult questions dividing us in recent cases . . . ."[153] Consequently, the Court declined the invitation of petitioners and amicus for the United States[154] to reconsider its decision in *Lemon*.[155]

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148. The court considered the invocations and benedictions to be advancements of religion because they created an identification of school with religious practice, prohibited by the second prong of the *Lemon* test. Since the practice of including invocations and benedictions failed to survive constitutional scrutiny under the second prong of the *Lemon* test, the court felt it unnecessary to discuss the first and third prongs of the test. Weisman v. Lee, 728 F. Supp. 68 (D.R.I.), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (1992).

149. Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (1992). Judge Bownes, although joining in the decision of the court, wrote a separate concurrence in which he stated that the invocations and benedictions offered here violated not only the second prong of the *Lemon* test, but also the remaining two prongs of the *Lemon* test. *Id.* at 1094-95. Judge Campbell dissented on the grounds that "First Amendment values are more richly and satisfactorily served by inclusiveness than by barring altogether a practice most people wish to have preserved." *Id.* at 1099 (Campbell, J., dissenting).

150. Lee v. Weisman, 111 S. Ct. 1305 (1991).

151. *Lee*, 112 S. Ct. at 2655. Justice Blackmun, Justice Stevens, Justice O'Connor and Justice Souter joined Justice Kennedy in the majority. *Id.*

152. *See supra* note 121.

153. *Lee*, 112 S. Ct. at 2655. There had been a significant division on the Court over the usefulness of the *Lemon* test. *See* discussion *supra* part III.

In the opinion of the Family Research Council, the fact that Justice Kennedy authored the majority opinion in *Lee* simply added "insult to injury." *Family Group*, *supra* note 15.

154. Solicitor General Kenneth W. Starr submitted an amicus brief on behalf of the United States asking the Court to abandon the *Lemon* test and formulate a new Estab-

In writing for the majority, Justice Kennedy rested his argument on the element of coercion. According to Justice Kennedy: "It is beyond dispute that . . . government may not coerce anyone to support or participate in religion or its exercise . . . ."[156] Justice Kennedy noted a "potential for divisiveness . . . in the secondary school environment where . . . subtle coercive pressures exist and where [a] student had no real alternative which would have allowed her to avoid the fact or appearance of participation."[157] Justice Kennedy

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lishment Clause framework of analysis based on a coercion theory. *See* Brief for The United States as Amicus Curiae, Lee v. Weisman, 112 S. Ct. 2649 (1991) (No. 90-1014)[hereinafter Brief for the United States].

The Solicitor General has traditionally played a very important role with respect to the Court and has often been referred to as the "tenth justice." The Solicitor General provides the Supreme Court legal counsel in difficult areas of the law, and "the Justices are likely to give serious consideration to his arguments." T. Page Johnson, Lee v. Weisman*: "The Tenth Justice" Takes Aim at the* Lemon *Test*, 67 EDUC. L. REP. 1021, 1021 (1990). Some scholars believed, therefore, that the Court, upon the advice of the Solicitor General, would overrule *Lemon* and adopt a new Establishment Clause test based on coercion in *Lee*. *Id.*

Strong urgings were presented by the Bush administration, via the Solicitor General, to overrule *Lemon* in order to provide for a greater accommodation of religion in American society. *See* Marcia Coyle, *New Wings Sprout on High Court*, NAT'L L.J., July 6, 1992, at 1; Marcia Coyle, *Not Just A Prayer*, NAT'L L.J., Nov. 11, 1991, at 1; Aaron Epstein, *Justices Ban Prayers at Public School Graduations*, PHILA. INQUIRER, June 25, 1992, at A1; Tony Mauro, *A Step Back from Redoing Religion Law*, LEGAL TIMES, Nov. 11, 1991, at 8.

155. *Lee*, 112 S. Ct. at 2655. Despite Justice Kennedy's declaration that the decision in *Lemon* need not be reconsidered and would remain precedent in this area, he failed to apply the *Lemon* test to reach a conclusion in *Lee*. In a scathing dissent, Justice Scalia attacked Justice Kennedy: "The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision." *Id.* at 2685 (Scalia, J., dissenting) (citation omitted).

Commenting on the discord between Justice Kennedy and Justice Scalia, Harvard Law Professor Laurence Tribe observed:

> Justice Scalia, in particular, has been rather sharp tongued and is getting more and more so. I think what's happening is in some ways when the stakes are reduced, the voices are increased. I mean, people are yelling at one another when they are really much closer together. It's a bit silly.

Crossfire (CNN television broadcast, June 24, 1992).

156. *Lee*, 112 S. Ct. at 2655. Justice Kennedy argued that the inspiration for the Establishment Clause lay in "the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." *Id.* at 2658.

157. *Id.* at 2656. The Court held that Deborah Weisman did not have any viable alternatives. The voluntary option of not attending the ceremony did not excuse the coercion.

> Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. . . . Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence

concluded that "[t]he State's involvement in the school prayers challenged today violates these central principles."[158] The majority, under Justice Kennedy, found "that prayer exercises in public schools carry a particular risk of indirect coercion."[159]

In his final analysis, Justice Kennedy stated that "[t]he sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform."[160] Justice Kennedy concluded: "No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment."[161] The ultimate holding in *Lee* rested upon coercion—government cannot persuade or compel an individual to religious practice.

Justice Blackmun wrote a separate concurrence in *Lee*[162] reaf-

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would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.

Id. at 2659. *But cf.* Brief for the United States, *supra* note 154, at 18 (arguing that the voluntary nature of the commencement exercises eliminated any form of coercion).

158. *Lee*, 112 S. Ct. at 2655.

159. *Id.* at 2658. Justice Kennedy emphasized that the students may have felt psychologically coerced to stand and pray during the ceremony. *Id.* at 2659. This is the type of coercion to which Justice Kennedy seems to be referring throughout the opinion in *Lee*; this type of coercion is a variation on the form of coercion originally examined by Justice Kennedy in *Allegheny*, 492 U.S. 573, 655-64, which is discussed *supra* notes 119-28 and accompanying text, and *Mergens*, 496 U.S. 226, 258-62, which is discussed *supra* notes 133-38 and accompanying text. By including psychological coercion in its analysis, the *Lee* Court significantly expanded the previous coercion analysis articulated by Justice Kennedy.

In dissent, Justice Scalia attacked Justice Kennedy's reasoning. Justice Scalia argued that "[a]s its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion, which promises to do for the Establishment Clause what the *Durham* rule did for the insanity defense." *Lee*, 112 S. Ct. at 2679 (Scalia, J., dissenting). Justice Scalia also sarcastically referred to the majority's opinion as "the Court's psycho-journey." *Id.* at 2684 (Scalia, J., dissenting). Apparently, Justice Scalia is primarily attacking Justice Kennedy's variation on the coercion analysis developed in *Lee*, rather than a fundamental conceptual framework based on coercion; Justice Scalia has agreed with Justice Kennedy that the coercion analysis presents a more workable model than *Lemon* for deciding Establishment Clause cases. *See, e.g.*, Board of Educ. v. Mergens, 496 U.S. 226, 258 (1990) (Kennedy, J., concurring in part, concurring in the judgment, joined by Scalia, J.); County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part, dissenting in part, joined by Rehnquist, C.J., White, J., and Scalia, J.).

When asked if this "is a case of what they call the narcissism of small differences," Mr. Jay Sukulow, co-counsel for the school district in *Lee v. Weisman*, stated: "I think some of it is just small differences in approach and not basically underlying theory [which] they agree on . . . ." *Crossfire*, *supra* note 155.

160. *Lee*, 112 S. Ct. at 2661.

161. *Id.*

162. Justice Stevens and Justice O'Connor joined in Justice Blackmun's concur-

firming *Lemon* and arguing that it was not necessary to show governmental coercion or governmental preference for a particular religion in order to determine whether the Establishment Clause had been violated.[163] Justice Souter also concurred in the decision of the *Lee* Court. He found no adequate historical basis for abandoning the Court's precedents in this area of the law and was, therefore, in agreement that *Lemon* need not be reconsidered.[164] Justice Souter also asserted that state coercion was not a necessary element of Establishment Clause doctrine.[165]

Justice Scalia dissented in *Lee* and was joined by Chief Justice Rehnquist, Justice White and Justice Thomas.[166] The dissenters argued that the graduation prayers were consistent with our nation's general history and tradition of prayer at public ceremonies.[167]

Thus, the coercion analysis found its way back into a majority opinion of the Court. Justice Kennedy's prior opinions advocating a coercion analysis failed to garner a majority; however, in *Lee*, Justice Kennedy was able to marshall support and espouse his views

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rence. *Id.* at 2661 (Blackmun, J., concurring).

163. *Id.* at 2664.

164. Justice Souter reasoned that "[i]n barring the state from sponsoring generically Theistic prayers where it could not sponsor sectarian ones, we hold true to a line of precedent from which there is no adequate historical case to depart." *Id.* at 2667 (Souter, J., concurring).

165. *Id.* at 2671-76. According to Justice Souter: "Our precedents may not always have drawn perfectly straight lines. They simply cannot, however, support the position that a showing of coercion is necessary to a successful Establishment Clause claim." *Id.* at 2672. *But cf.* discussion *supra* part I.B (illustrating the manner in which coercion had, in fact, been a necessary element in Establishment Clause analysis).

Additionally, Justice Souter asserted that he joined "the whole of the Court's opinion, and fully agree[d] that prayers at public school graduation ceremonies indirectly coerce religious observance." *Lee*, 112 S. Ct. at 2667. Since Justice Stevens and Justice O'Connor joined Justice Souter's concurrence, they would, therefore, by extension also have joined in the "whole of the Court's opinion." It is questionable, however, whether Justice Stevens, Justice O'Connor and Justice Souter did, in fact, join in "the whole" of Justice Kennedy's opinion. Justice Kennedy advocates the coercion analysis, and yet these three Justices—Justice Stevens, Justice O'Connor, and Justice Souter—assert in concurrence that coercion is not a requisite element in proving an Establishment Clause violation. *Id.*

166. *Lee*, 112 S. Ct. at 2678 (Scalia, J., dissenting).

167. In dissent, Justice Scalia argued:

> [T]he long standing American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.
>
> The narrow context of the present case involves a community's celebration of one of the milestones in its young citizens' lives, and it is a bold step for this Court to seek to banish from that occasion, and from thousands of similar celebrations throughout this land, the expression of gratitude to God that a majority of the community wishes to make.

Id. at 2686.

concerning coercion in a majority decision.[168] The decision provides a foundation upon which Establishment Clause jurisprudence, based on the element of coercion, may be developed in subsequent cases.[169]

B. *Analysis*

The decision in *Lee* is an anomaly in two respects.[170] First, the majority in *Lee* declined the invitation of petitioners to reconsider its decision in *Lemon v. Kurtzman*,[171] yet failed to employ the *Lemon* test to determine the constitutionality of invocations and benedictions at high school commencement exercises.[172] Consequently, the current, as well as future, status of the *Lemon* framework remains unclear, and the proper role for the *Lemon* test, if there remains one at all in Establishment Clause jurisprudence, has yet to be determined.[173] Second, the manner in which the Justices aligned them-

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168. This fact takes on even greater significance when one examines Justice Kennedy's concurring opinion in *Allegheny*. In *Allegheny*, Justice Kennedy berated the majority for basing its decision on a "precedent" that was embodied in a concurring opinion, written by Justice O'Connor in *Lynch*. Justice Kennedy stated: "It has never been my understanding that a concurring opinion 'suggest[ing] a clarification of our . . . doctrine' could take precedence over an opinion joined in its entirety by five Members of the Court." County of Allegheny v. ACLU, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part, dissenting in part) (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

Taking this argument to its logical extension, it can be concluded that Justice Kennedy knew that his views with respect to the coercion analysis would not bear significantly on Establishment Clause doctrine unless they were asserted in a majority decision. Justice Kennedy seized the opportunity presented in *Lee* to espouse these views in a majority decision.

169. According to Justice Kennedy's analysis, this majority opinion will carry precedential weight over the concurrences in *Lee* of Justice Blackmun and Justice Souter, which asserted that coercion is not a necessary element in determining whether an Establishment Clause violation has occurred. *See supra* note 168.

170. It has been posited that "[t]he . . . observer who seeks to make sense of the Supreme Court's rulings in establishment clause cases is in for a shock." A.E. DICK HOWARD ET AL., CHURCH, STATE, AND POLITICS: FINAL REPORT OF THE 1981 CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES 21 (Jaye B. Hensel ed., 1981).

171. 403 U.S. 602 (1971); *see supra* note 155 and accompanying text.

172. *Lee*, 112 S. Ct. at 2655-61; *see infra* note 173.

173. The majority in *Lee* did not explicitly reject the *Lemon* test. However, "given its conspicuous absence in the majority opinion," it is questionable whether *Lemon* remains the law of the land. Martha M. McCarthy, *Is the Wall of Separation Still Standing?*, 77 EDUC. L. REP. 1, 8 (1992). Instead, "this standard will likely fade quietly into establishment clause history." *Id.* at 8.

Further, "by writing an opinion that ignored the *Lemon* framework and focused on the coercive effects of government activities, the Court . . . moved toward the adoption of a coercion test . . . ." *The Supreme Court, 1991—Leading Cases*, 106 HARV. L. REV. 163, 260 (1992) [hereinafter *Leading Cases*]. The Court, if it had applied the *Lemon* framework, could have reached the same result in *Lee*. The graduation prayers would have constituted "excessive entanglement" between church and state prohibited by the third prong of the *Lemon* test. *Id.* at 263. "This substantial effort to avoid reliance on *Lemon* suggests

selves defies logic when one carefully examines each Justice's ideological disposition toward the coercion analysis prior to *Lee*. These two idiosyncratic aspects of the Court's decision in *Lee* need to be resolved—the Supreme Court must officially overrule *Lemon* and readopt the coercion analysis in order to come full circle.

An indication of *Lemon*'s fate can be gleaned from examining the Supreme Court. Currently,[174] four Justices are highly critical of the *Lemon* test: Chief Justice Rehnquist, Justice White, Justice Scalia and Justice Kennedy.[175] In addition to the more vocal critics of *Lemon*, Justice Blackmun and Justice O'Connor have previously advocated a modification of the *Lemon* test.[176]

Due to their recent elevation to the Court, the Establishment Clause jurisprudence of Justice Souter and Justice Thomas remains highly speculative. *Lee* was the first decision wherein either of their views was expressed on the Establishment Clause.[177] *Lee* does, however, give some indication as to how both Justices will vote in subsequent Establishment Clause cases. Justice Souter appears committed to *stare decisis*, and would, therefore, be in favor of retaining the *Lemon* test.[178] Justice Thomas, by contrast, appears to take a more accommodationist stance toward the Establishment Clause, similar

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that the Court may be willing to allow the coercion test to . . . supplant entirely . . . the *Lemon* framework." *Id.* at 264. "In [*Lee v.*] *Weisman*, the Court left open the possibility that a coercion test would replace the *Lemon* framework." *Id.* at 269.

174. *See infra* note 192.

175. Each of these Justices has openly expressed criticism of the Court's continued utilization of the *Lemon* test. *See supra* notes 90-104 and accompanying text.

176. *See supra* notes 105-08 and accompanying text. The extent of the modifications that Justices Blackmun and O'Connor would find acceptable remains uncertain.

177. Both Justices, however, were questioned about their Establishment Clause philosophies at their confirmation hearings. When asked about the Establishment Clause and the *Lemon* test, Justice Souter suggested "that the Court's current interpretation of the Establishment Clause, the three-part test of *Lemon v. Kurtzman* raised difficult issues." 16A THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1990, at 1364 (Ray M. Mersky et al. eds., 1992) (quoting transcript of David H. Souter's hearing before the Senate Judiciary Committee, Sept. 17, 1991, at 105). However, Justice Souter "did not repudiate the *Lemon* test." *Id.* Further, he stated "that he did 'not approach the Court with any inclination or agenda' to change the law . . . ." *Id.* Instead, "he would listen to the arguments for such a change but would give appropriately heavy weight to precedent." *Id.*

When questioned about the Establishment Clause at his confirmation hearings, Justice Thomas remarked: "I have an open mind with respect to the debate over the application of the *Lemon v. Kurtzman* test." *Souring on* Lemon, A.B.A. J., Feb. 1992, at 48, 48. Prior to his confirmation, one media source stated: "Thomas has quoted his mother as saying, 'When they took God out of the schools, the schools went to hell . . . ' [and Thomas has] added, 'She may be right.'" Evan Thomas, *Where Does He Stand*, NEWSWEEK, July 15, 1991, at 16.

178. Justice Souter expressed his commitment to *stare decisis* at his confirmation hearings and also in *Lee*, his first Establishment Clause opinion. *See supra* note 177.

to that taken by Chief Justice Rehnquist, Justice White, and Justice Scalia in *Lee*.[179] As a result, he too may become critical of the *Lemon* framework.

Justice Stevens is the lone Justice on the Court who vehemently supports the continued use of the *Lemon* test.[180]

Therefore, it is unlikely that it will be retained as the test for deciding Establishment Clause questions. There are enough votes at present to explicitly overrule *Lemon*. Chief Justice Rehnquist, Justice White, Justice Scalia, Justice Kennedy and Justice Thomas would agree to an outright rejection of *Lemon*. It appears that Justice Blackmun and Justice O'Connor would still vote in favor of modifications to the *Lemon* test which would require at least a partial overruling of *Lemon v. Kurtzman*.[181] Justice Stevens and Justice Souter would remain, in all likelihood, the only supporters of the Court's continued use of the *Lemon* test.

The proper role for the coercion analysis in Establishment Clause jurisprudence was neither comprehensively defined nor officially adopted in *Lee*. In fact, the judicial composition of the *Lee* majority does not comport with a reasoned analysis of each Justice's ideological dispositions toward a coercion analysis.

Chief Justice Rehnquist, Justice White, and Justice Scalia joined Justice Kennedy's opinion in *Allegheny*[182] indicating their agreement with his advocation of the coercion analysis as a replacement for the faulty *Lemon* test. Moreover, Justice Scalia joined Justice Kennedy again in a similar criticism of *Lemon* and articulation of the coercion analysis in *Mergens*.[183] Consequently, it appeared that these four Justices would align to support the readoption of the coercion analysis in *Lee v. Weisman*.

It was also evident prior to *Lee* that Justice Blackmun, Justice Stevens and Justice O'Connor did not favor a coercion analysis. Theoretically, these three Justices should have argued against the adoption of a coercion analysis in *Lee v. Weisman*.

Prior to *Lee*, the resolution of the *Lemon*-coercion dichotomy by Justice Souter and Justice Thomas remained unknown.[184] Justice

179. In *Lee*, Justice Thomas voted with Chief Justice Rehnquist, Justice White, and Justice Scalia—all long-standing critics of the *Lemon* test.

180. In *Allegheny*, Justice Stevens avidly supported *Lemon*. County of Allegheny v. ACLU, 492 U.S. 573, 645-55 (1989). "There is no reason to believe that [he] would relax his adherence to the traditional *Lemon* tests . . . ." Mawdsley & Russo, *supra* note 147, at 197.

181. 403 U.S. 602 (1971).

182. *Allegheny*, 492 U.S. at 655. Justice Kennedy's opinion in *Allegheny* is discussed *supra* notes 119-28 and accompanying text.

183. Board of Educ. v. Mergens, 496 U.S. 226 (1990). Justice Kennedy's opinion in *Mergens* is discussed *supra* notes 133-38.

184. Although questioned at their confirmation hearings about the *Lemon* test, Jus-

Souter's comments at his confirmation hearings about the role of *stare decisis* indicated that he would not be an advocate of the coercion analysis, but would instead support the *Lemon* test. Justice Thomas' vote could have gone either way.[185]

In short, a breakdown of the Court on the coercion analysis immediately preceding *Lee* would have placed Chief Justice Rehnquist, Justice White, Justice Scalia and Justice Kennedy favoring the adoption of the coercion analysis; Justice Blackmun, Justice Stevens, Justice O'Connor and Justice Souter opposing the adoption of the coercion analysis; and Justice Thomas casting the swing vote. This is not what occurred!

Defying all predictions, Justice Kennedy's majority opinion in *Lee* was joined by Justice Blackmun, Justice Stevens, Justice O'Connor and Justice Souter. A reading of the "majority opinion by itself might lead one to conclude that *Lemon* had been replaced by a 'coercion' test—some element of compelled participation in religious observance would be necessary for a governmental practice to violate the establishment clause."[186] However, that conclusion would be premature. While it is true that Justice Kennedy argued in favor of the coercion analysis, "the four justices who joined Justice Kennedy . . . wrote separately to emphasize that coercion is . . . not required, to abridge the establishment clause."[187] The Justices who had previously agreed with Justice Kennedy's coercion analysis—Chief Justice Rehnquist, Justice White, and Justice Scalia—dissented in *Lee* and were joined by Justice Thomas.[188]

Two explanations can be advanced as to why the decision in *Lee* defied all predictions. The first explanation is that the unexpected alignments could have resulted from a difference of opinion among the Justices as to the proper definition of coercion and the result which should be reached. Justice Kennedy and the dissenters diverged in *Lee* as a result of conflicting interpretations of coercion. In *Lee*, as opposed to *Allegheny* and *Mergens*, Justice Kennedy defined coercion "broadly to encompass social and psychological pressure as well as brute force."[189] This definition of coercion was perhaps too

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tice Souter and Justice Thomas were never asked about their philosophy with respect to the coercion analysis. *See supra* note 177.

185. Justice Thomas indicated at his confirmation hearings that he had an "open mind" with respect to the Establishment Clause. *See supra* note 177.

186. McCarthy, *supra* note 173, at 8.

187. *Id.* at 9.

188. As one Supreme Court observer has stated: "For the past decade Rehnquist and White, now joined by Antonin Scalia and Clarence Thomas, have been trying to scuttle the [*Lemon*] test for an alternative that would permit unabashed government support for religion, including school prayer." Jeffrey Rosen, *Lemon Law*, NEW REPUBLIC, Mar. 29, 1993, at 17.

189. Kathleen M. Sullivan, *The Supreme Court, 1991—Forward: The Justices of*

expansive for the dissenters in *Lee*.[190] Conversely, Justice Kennedy and the other Justices in the majority may have converged because of the result that was reached; they were all in favor of striking down the graduation prayers as unconstitutional.

The second explanation for the result in *Lee* may have to do with the facts of the case. The facts in *Lee* concerned only the specific practice of invocations and benedictions at graduation ceremonies, which occurred once a year, and not a more common religious practice occurring in public schools on a daily basis. Thus, the facts were extremely specific and did not provide an adequate basis upon which to announce a new Establishment Clause doctrine.[191] Quite possibly, the Court was waiting for an Establishment Clause question that would address a wider range of concerns than those before the Court in *Lee*.

When the coercion analysis is narrowed in a more factually appropriate case, Justice Kennedy, joined by Chief Justice Rehnquist, Justice White, Justice Scalia and Justice Thomas, will vote in favor of its readoption.

CONCLUSION

Following the Supreme Court's decision in *Lee v. Weisman*, the future of the coercion analysis in Establishment Clause jurisprudence seems fairly certain. Within the next few terms, another Es-

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Rules and Standards, 106 HARV. L. REV. 22, 38 (1992). "Justice Kennedy looked in [*Lee v.*] *Weisman* to sociology and psychology rather than to history and tradition to inform his interpretation of the Establishment Clause." *Id.* at 39 (footnote omitted).

190. The dissent instead adopted a traditional definition of coercion—that governmental action coerces people only when it threatens them with legal penalty. Lee v. Weisman, 112 S. Ct. 2649, 2683-84 (1992) (Scalia, J., dissenting). Justice Scalia argued that the definition of coercion should come from "the disciples of Blackstone rather than of Freud." *Id.* at 2684. If a traditional definition of coercion had been applied to the prayers in *Lee* they may have survived constitutional scrutiny, since the students would have received no punishments as a result of failure to attend the ceremony or to stand during the prayers. *Leading Cases*, *supra* note 173, at 264. In order for the dissenters to have joined Justice Kennedy's opinion, the coercion analysis would have had to have been narrowly tailored as it was in *Allegheny* and *Mergens* and the prayers would have had to have been upheld.

191. Robert L. Cord, *Church, State, and the Rehnquist Court*, NAT'L REV., Aug. 17, 1992, at 35. As Kathleen Sullivan has commented: "[*Lee v.*] *Weisman* may have been a poor vehicle for those who would have pioneered a narrow coercion test . . . ." Sullivan, *supra* note 189, at 39. Instead, Justice Kennedy "embraced a more cautious approach in [*Lee v.*] *Weisman*, adhering to and modestly extending the Court's school prayer precedents, but declining to consider the contours of the Establishment Clause beyond the case's specific facts." *Id.* One scholar has commented: "In essence, I see Justice Kennedy saying that today the Supreme Court decides this case *only* and *does not rule* on any of the difficult church-state issues which have divided the Court and which still are open for reconsideration." Cord, *supra*, at 37.

tablishment Clause case, with a broader, more factually appropriate basis, will present itself to the Court. Therein, Justice Kennedy, joined by Chief Justice Rehnquist, Justice White,[192] Justice Scalia, and Justice Thomas will definitively overrule *Lemon*, and adopt a narrowly defined coercion analysis as the framework by which to decide Establishment Clause questions. In so doing, the Supreme Court will be providing for a greater acknowledgement and accommodation of religion in American society—a position consistent with the intent of the Framers of the Establishment Clause and with the Court's early Establishment Clause jurisprudence. When such a case is decided, the Supreme Court will have come full circle.

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192. A year after the Court's decision in *Lee v. Weisman* and subsequent to the writing of this Comment, Justice Byron White retired from the Supreme Court after 31 years. Justice White was a strong critic of the *Lemon* test, *see supra* notes 95-96 and accompanying text, and also had been a supporter of the coercion analysis, *see supra* notes 119-21 and accompanying text. After Justice White's retirement, only four votes remain to overrule *Lemon* and adopt the coercion analysis as the mechanism for deciding Establishment Clause questions.

The vacancy created by Justice White's retirement has been filled by Ruth Bader Ginsburg, formerly a judge on the D.C. Circuit. It is too early in Justice Ginsburg's first term on the Supreme Court to determine her stance on the Establishment Clause. Further, "[t]here is very little in her record on the D.C. Circuit on which to base a prediction of what Justice Ginsburg's position will be on the Establishment Clause." Jesse H. Choper, *Benchmarks*, A.B.A. J., Nov. 1993, at 78, 80.

However, some indication of Justice Ginsburg's Establishment Clause jurisprudence can be gleaned from her testimony at her Senate confirmation hearings. When asked what the appropriate test should be for deciding Establishment Clause questions, Justice Ginsburg responded that she did not "have a satisfactory alternative" to *Lemon*, but added that she was "open to arguments, to ideas." *Hearings of the Senate Judiciary Committee on the Confirmation of Ruth Bader Ginsburg as Supreme Court Justice*, July 21, 1993, available in LEXIS, Nexis Library, Federal News Service File. Therefore, it is plausible that Justice Ginsburg would endorse the coercion analysis as an alternative to the *Lemon* test. *But cf.* Choper, *supra*, at 80 (noting that Justice Ginsburg's "general background points to her being much more a church-state 'separationist' than Justice White, and much less likely to align herself with Justice Kennedy's more 'accomodationist' 'coercion' approach").